METRO GAIN SDN BHD

v.

COMMERCE ASSURANCE BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
CLEMENT SKINNER JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: J-02-2975-11-2011]
13 DECEMBER 2013

INSURANCE: *Fire insurance - Repudiation of liability - Non-disclosure - Insurance policy taken by textile manufacturer against risks of fire and consequential losses - Losses caused by fire - Whether there was an unauthorized risk-increasing change to the type of activity carried on or to the nature of occupation of the premises - Whether insurer entitled to repudiate liability*

INSURANCE*: Fire insurance - Repudiation of liability - Notice of claim - Insurance policy against risks of fire and fire consequential losses - Whether proper notice of claim given within the stipulated period - Whether insurer had waived requirement for notice of claim to be given within stipulated period - Whether insurer estopped from demanding that notice of claim be given within stipulated period - Whether insurer entitled to repudiate liability*

INSURANCE: *Waiver - Waiver of a breach of condition precedent - Whether must be an express waiver - Whether waiver can be implied from actions of insurer*

The appellant/plaintiff ('appellant') had filed a writ action against the respondent/defendant ('respondent'), an insurance company. The appellant had been purchasing fire insurance policies from the respondent to insure its factory premises against the risk of fire for several years prior to a fire which occurred on 12 October 2005. On the date of the fire, there were two fire insurance policies in force, namely a Fire and Allied Perils Policy ('the FMD Policy') and a Fire Consequential Loss Insurance Policy ('the FCL Policy'). The fire occurred within the validity period of both policies. The FMD Policy covered loss of stock-in-trade (raw materials, semi-finished, and fully finished products), fire damage to sewing machines and boiler/lift. The appellant pleaded that fire damage to

A electrical installation, office equipment, furniture, fixtures and fittings was also covered but the respondent had denied that it was covered under the FMD Policy. The FCL Policy covered loss of gross profit caused by fire. The appellant's statement of claim included a claim for fire damage to electrical installation, office
B equipment, furniture, fixtures and fittings based on the FMD Policy. There was no specific plea in the defence on this issue. The respondent submitted that fire damage to electrical installation, office equipment, furniture, fixtures and fittings was originally covered under the FMD Policy but that it was omitted in a
C subsequent endorsement. The respondent in seeking to repudiate liability completely, pleaded *inter alia*, fraud. The respondent claimed that the appellant had breached condition 9(a) of the FMD Policy and condition 8(c) of the FCL Policy since its loss adjusters' report had stated that the appellant's stocks and sewing
D machines were arranged too closely and in an unusual way which increased the risk of their destruction in the event of a fire. The respondent further claimed that condition 12 had also been breached since a "notice of claim" ought to have been given within 15 days of the fire and that the appellant's written notice
E of claim was submitted only on 2 February 2006. The respondent also pleaded a breach of condition 15 of the FMD Policy alleging that the fire was deliberately caused by the plaintiff or that the starting of it was connived at by the plaintiff. The learned Judicial Commissioner ('JC') held that he could not determine whether the
F fire was caused by arson or by accident. However, he upheld the respondent's repudiation and dismissed the appellant's claim. Hence, this appeal.

Held (allowing appellant's appeal)

G **Per Abdul Malik Ishak JCA delivering the judgment of the court:**

(1) The essence of conditions 9(a) and 8(c) was that the insurance ceased to attach as regards the property affected if
H the appellant was to alter the type of activity carried on at the premises outside the original scope of coverage or if the nature of the occupation affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire, unless the appellant had
I obtained prior sanction to make such alteration or changes. It was undisputed that the FMD policy did permit the appellant

to use the insured premises to carry on the business of garment manufacturer, and the business of import, export, warehouse and wholesaler. Thus, even if there had really been any change from the business of garment manufacturer to the business of import, export, warehouse and wholesaler of garments, it was well within the endorsed scope of coverage, and not a risk-increasing change or alteration which required prior sanction from the respondent. (paras 26, 27 & 28)

(2) The appellant was in the best position to decide the most expedient method of managing its premises. The insured was also in the best position to decide how to maximise storage space. On the evidence, there was in fact no alteration of the appellant's trade or manufacture outside the scope of the original coverage. There was no cogent evidence adduced by the respondent to support its contention that there was a breach of condition 9(a). The evidence adduced was, at best, bordering on conjectures and speculations. The JC had erred in his findings that condition 9(a) of the FMD Policy and condition 8(c) of the FCL Policy were breached. (paras 32 & 34)

(3) The appellant had given prompt notice of the fire to the respondent. Notice in writing was given within six days of the fire *vide* the appellant's letter dated 18 October 2005. Its contents did clearly notify the respondent of the appellant's intention "to make full loss claim". The appellant's letter dated 18 October 2005 was the "notice of claim" required by the respondent. The appellant's subsequent letter on 2 February 2006 had merely given details of its claims after having received the respondent's loss adjusters' letter dated 20 December 2005 which listed all those documents required by the respondent. (para 38)

(4) The respondent had, by conduct in sending the appellant a list of documents to be furnished instead of issuing a repudiation letter upon expiry of the 15 days period, waived the strict requirement of a detailed claim to be submitted within 15 days after the fire. Alternatively, since the appellant had pleaded estoppel against the respondent in its reply, the respondent was estopped from contending a breach of condition 12 of the FMD Policy. (para 49)

(5) A waiver plays an important part in insurance law. A waiver of a breach of a condition precedent need not be an express waiver. A waiver can readily be implied from the actions of the insurer. (para 50)

(6) The JC had decided that he could not hold that the cause of the fire was deliberate or accidental. Since the respondent did not file any cross-appeal, the cause of the fire was a non-issue. In such a factual situation, the law gives the benefit of the doubt to the insured. (para 55)

(7) Based on the respondent's pleaded defence and the evidence adduced, the JC had erred in upholding the respondent's repudiation of liability. A correct finding would have been that liability had been established and to consider the quantum for the judgment to be awarded. (para 62)

(8) As for the FCL Policy, it was intended to cover loss of gross profits suffered by the appellant. The appellant should have adduced more detailed evidence to substantiate its claim for loss of profits. The evidence adduced was inadequate. The appellant thus failed to prove the amount of loss of gross profits claimed. (para 95)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif ('perayu') telah memfailkan tindakan writ terhadap responden/defendan ('responden'), sebuah syarikat insurans. Perayu telah membeli polisi insurans kebakaran daripada responden untuk menginsuranskan premis kilangnya terhadap risiko kebakaran untuk beberapa tahun sebelum kebakaran berlaku pada 12 Oktober 2005. Pada tarikh kebakaran, terdapat dua polisi insurans berkuatkuasa, iaitu Polisi Kebakaran dan Bahaya ('Polisi FMD') dan Polisi Insurans Kerugian Akibat Kebakaran ('Polisi FCL'). Kebakaran telah berlaku dalam tempoh sah kedua-dua polisi tersebut. Polisi FMD melindungi kerugian stok perdagangan (bahan-bahan mentah, bahan separuh siap dan produk siap sepenuhnya), dan kebakaran mesin jahit dan dandang/lif. Perayu telah memplidkan supaya kebakaran kepada pemasangan elektrik, peralatan pejabat, perabot, lekapan dan kelengkapan juga dilindungi tetapi responden menafikan bahawa ia dilindungi di bawah polisi FMD. Polisi FCL meliputi kehilangan keuntungan

kasar disebabkan kebakaran. Pernyataan tuntutan perayu merangkumi tuntutan kerosakan akibat kebakaran kepada pemasangan elektik, peralatan pejabat, perabot, lekapan dan kelengkapan berdasarkan polisi FMD. Tiada pengakuan tertentu daripada pembelaan berkenaan isu ini. Responden berhujah bahawa kerosakan akibat kebakaran kepada pemasangan elektrik, peralatan pejabat, perabot, lekapan dan kelengkapan pada asalnya dilindungi di bawah polisi FMD tetapi ia telah diketepikan dalam pengesahan berikutnya. Responden dalam memohon untuk menolak liabiliti sepenuhnya, memplid antara lain, fraud. Responden mendakwa bahawa perayu telah melanggar syarat 9(a) Polisi FMD dan syarat 8(c) Polisi FCL kerana laporan pelaras kerugian telah menyatakan bahawa stok dan mesin jahit perayu telah disusun terlalu rapat dan dengan cara ganjil yang meningkatkan risiko kemusnahan mereka sekiranya berlaku kebakaran. Responden juga mendakwa bahawa syarat 12 telah dilanggar atas sebab "Notis Tuntutan" seharusnya diberikan dalam tempoh 15 hari kebakaran dan Notis Tuntutan bertulis perayu telah diserahkan hanya pada 2 Februari 2006. Responden juga memplid terdapat perlanggaran syarat 15 Polisi FMD yang mendakwa bahawa kebakaran telah sengaja disebabkan oleh plaintif atau permulaannya telah dibiarkan oleh plaintif. Pesuruhjaya Kehakiman ('PK') memutuskan bahawa beliau tidak boleh memastikan sama ada kebakaran telah disebabkan oleh arson atau secara kebetulan. Walau bagaimanapun, PK telah menyokong penyangkalan responden dan menolak tuntutan perayu, dan dengan itu rayuan ini.

Diputuskan (membenarkan rayuan perayu)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Intipati syarat 9(a) dan 8(c) adalah ikatan insurans berhubungan harta terjejas akan berhenti jika perayu mengubah jenis aktiviti yang dijalankan di luar premis skop asal perlindungan atau jika sifat pendudukan mempengaruhi bangunan yang diinsuranskan atau mengandungi harta yang diinsuranskan diubah dalam apa-apa cara yang meningkatkan risiko kerugian atau kerosakan akibat kebakaran, melainkan jika perayu memperolehi kebenaran terlebih dahulu untuk membuat pengubahan atau perubahan tersebut. Tidak dipertikaikan bahawa polisi FMD membenarkan perayu menggunakan premis yang diinsuranskan untuk menjalankan perniagaan pengeluar

pakaian, dan perniagaan import, eksport, gudang dan pemborong. Oleh itu, walaupun sudah terdapat perubahan daripada perniagaan pengeluar pakaian kepada perniagaan import, eksport, gudang dan pemborong, ia adalah dalam liputan skop yang sah, dan bukanlah pertukaran atau perubahan yang boleh meningkatkan risiko yang memerlukan kebenaran terlebih dahulu daripada responden.

(2) Perayu berada dalam kedudukan yang terbaik untuk memutuskan kaedah yang paling sesuai untuk menguruskan premisnya. Pengambil insurans juga berada dalam kedudukan terbaik untuk memutuskan bagaimana untuk memaksimumkan ruang simpanan. Mengikut keterangan yang dikemukakan, tiada perubahan perdagangan dan pembuatan perayu di luar skop liputan asal. Tiada keterangan memadai yang dikemukakan oleh responden untuk menyokong hujahannya bahawa terdapat perlanggaran syarat 9(1). Keterangan yang dikemukakan adalah, sekurang-kurangnya, tekaan dan spekulasi. PK telah khilaf apabila mendapati bahawa syarat 9(a) Polisi FMD dan syarat 8(c) Polisi FCL telah dimungkiri.

(3) Perayu telah memberi notis serta merta berkenaan kebakaran kepada responden. Notis bertulis telah diberikan dalam tempoh 6 hari berlakunya kebakaran melalui surat perayu bertarikh 18 Oktober 2005. Kandungannya jelas memberitahu responden niat perayu untuk "membuat tuntutan kerugian penuh". Surat perayu bertarikh 18 Oktober 2005 adalah "Notis Tuntutan" yang diperlukan oleh responden. Surat perayu seterusnya bertarikh 2 Februari 2006 hanya memberi butir-butiran tuntutannya selepas menerima surat pelaras kerugian responden bertarikh 20 Disember 2005 yang menyenaraikan kesemua dokumen yang diperlukan oleh responden.

(4) Responden telah, melalui tindakannya menghantar kepada perayu senarai dokumen untuk dilengkapi dan bukan surat penolakan apabila tamat tempoh 15 hari, mengetepikan keperluan ketat tuntutan terperinci untuk diserahkan dalam tempoh 15 hari selepas berlakunya kebakaran. Secara alternatif, oleh kerana perayu telah memplidkan estoppel terhadap responden, responden diestop daripada mendakwa bahawa terdapat perlanggaran syarat 12 Polisi FMD.

(5) Penepian memainkan peranan penting dalam undang-undang insurans. Penepian perlanggaran syarat terdahulu tidak perlu penepian nyata. Penepian boleh terimplikasi daripada tindakan penanggung insurans.

(6) PK telah memutuskan bahawa beliau tidak boleh menyatakan punca kebakaran adalah disengajakan atau tidak. Oleh kerana responden tidak memfailkan rayuan balas, punca kebakaran bukanlah satu isu dalam rayuan ini. Dalam keadaan fakta sebegitu, undang-undang memberi manfaat keraguan kepada pihak yang diinsuranskan.

(7) Berdasarkan pembelaan yang telah diplidkan dan keterangan yang telah dikemukakan, PK telah khilaf dalam mempertahankan penolakan liabiliti responden. Penemuan yang betul sepatutnya adalah bahawa liabiliti telah dibuktikan dan kuantum dipertimbangkan untuk penghakiman diawardkan.

(8) Bagi Polisi FCL pula, ia adalah diperuntukkan untuk melindungi kehilangan keuntungan kasar yang dialami perayu. Perayu seharusnya mengemukakan lebih banyak keterangan terperinci bagi mengesahkan tuntutannya untuk kerugian keuntungan. Keterangan yang dikemukakan adalah tidak memadai. Perayu oleh itu gagal untuk membuktikan jumlah kerugian keuntungan kasar yang dituntut.

[Perintah sewajarnya.]

Case(s) referred to:

Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors [1995] 4 CLJ 551 CA ***(refd)***

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327 HC ***(refd)***

Barratt Bros (Taxis) Ltd v. Davies, Lickiss (First Third Party), Milestone Motor Policies At Lloyd's (Second Third Party) [1966] 2 Lloyd's Rep 1 CA ***(refd)***

Dennis v. AJ White & Co [1916] 2 KB 1 CA ***(refd)***

Esso Petroleum Co Ltd v. Southport Corporation [1956] AC 218 HL ***(refd)***

Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC ***(refd)***

A *Globe Trawlers Pte Ltd v. National Employers Mutual General Insurance Association Ltd & Anor [1989] 1 CLJ 831; [1989] 2 CLJ (Rep) 924 HC* ***(refd)***

In the matter of the estate and effects of Timah Abdullah, deceased, The Official Administrator, FMS v. 1. Magari Mohihiko 2. Hayashi Tose 3. Udah Bakar 4. State of Pahang [1941] 10 MLJ 51 ***(refd)***

B *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd [2003] 2 CLJ 520 HC* ***(refd)***

Kong Nen Siew v. Lim Siew Hong [1971] 1 LNS 53 ***(refd)***

Lee Chow Meng v. PP [1975] 1 LNS 199 ***(refd)***

Lee Lip Ngee v. Crown Counsel [1947] 13 MLJ 68 ***(refd)***

C *Lim Kong v. PP [1962] 1 LNS 89* ***(refd)***

Lim Tiong Huai v. Wang Swee Teck berniaga sebagai Wang Plumbering & Electric Co [2003] 1 LNS 564 HC ***(refd)***

May v. Chidley [1894] 1 QB 451 ***(refd)***

Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(refd)***

D *Narayanan Ponnusamy v. Kannamah Ponnusamy [1993] 4 CLJ 389 HC* ***(refd)***

Pang Ah Chee v. Chong Kwee Sang [1985] 2 CLJ 221; [1985] CLJ (Rep) 236 FC ***(refd)***

Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd [1985]

E *1 LNS 122 SC* ***(refd)***

Pioneer Concrete (UK) Ltd v. National Employers Mutual General Insurance Association Ltd [1985] 1 Lloyd's Rep 274 ***(refd)***

PP v. Bujang Ali & Ors [1977] 1 LNS 90 HC ***(refd)***

Ram Tarak v. Selgrant [1944] AC 153 ***(refd)***

Ramah Ta'at v. Laton Malim Sutan [1931] 6 FMSLR 128 CA ***(refd)***

F *Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd [2001] 5 CLJ 371 HC* ***(refd)***

RHB Bank Bhd v. Dong Haeng Industries Sdn Bhd [2001] 1 CLJ 417 HC ***(refd)***

Ria Enterprise & Ors v. MBF Finance Bhd [2001] 1 CLJ 687 HC ***(refd)***

G *Roberts v. Plant [1895] 1 QB 597* ***(refd)***

S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC ***(refd)***

Slattery v. Mance [1962] 1 QB 676 ***(refd)***

Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***

H *The Chartered Bank v. Yong Chan [1974] 1 LNS 178 FC* ***(refd)***

The Yorkshire Insurance Company Limited And Another v. Craine [1920] 28 CLR 305 ***(refd)***

Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd [1978] 1 LNS 220 FC ***(refd)***

I *Whiting v. East London Waterworks Company [1884] WN 10* ***(refd)***

Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan [1986] 1 LNS 46 SC ***(refd)***
Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***
Yong Pak Yong v. PP [1959] 1 LNS 102 ***(refd)***
Yorkshire Insurance Co v. Craine [1922] 2 AC 541 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 65

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - Tunku Farik Tunku Ismail (Tan Sixin with him); M/s Tetuan Azim, Tunku Farik & Wong

[Editor's note: For the High Court judgment, please see Metro Gain Sdn Bhd v. Commerce Assurance Bhd [2011] 1 LNS 1403.]

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] In the High Court below, the appellant/plaintiff had filed a writ action against the respondent/defendant which is an insurance company as the respondent had sought to repudiate liability.

[2] The learned Judicial Commissioner held that based on the evidence, he could not determine whether the fire was caused by arson or by accident. However, he upheld the respondent's repudiation and dismissed the appellant's claim, and hence this appeal. Hearing before us took two days as the appeal records were voluminous and in the interest of fairness to both parties, we reserved our decision to deliberate after the conclusion of the hearing.

Brief Facts

[3] It was not disputed that the appellant had been purchasing fire insurance policies from the respondent to insure its factory premises against the risk of fire for several years prior to a fire which occurred on 12 October 2005. The respondent's claims

examiner by the name of Ahmad Rafikin bin Kusni (DW4) admitted that there had been no claim made by the appellant in previous years of coverage.

[4] DW4 also confirmed that on the date of the fire, there were two fire insurance policies in force, namely a Fire and Allied Perils Policy ("the FMD Policy") and a Fire Consequential Loss Insurance Policy ("the FCL Policy"). It was undisputed that the fire on 12 October 2005 occurred within the validity period of both policies.

[5] The terms and conditions of both policies were almost similar, with the FMD Policy covering loss of stock-in-trade (raw materials, semifinished, and fully finished products), fire damage to sewing machines and boiler/lift. The appellant had pleaded that fire damage to electrical installation, office equipment, furniture, fixtures and fittings was also covered but the respondent had denied that it was covered under the FMD Policy, making this dispute one of the issues laid before us. The FCL Policy covered loss of gross profit caused by fire and hence aptly named as a Fire Consequential Loss Insurance Policy.

Whether Fire Damage To Electrical Installation, Office Equipment, Furniture, Fixtures And Fittings Covered Under The Fmd Policy?

[6] As this issue is of pure documentary nature, we shall address it first. The appellant's statement of claim included a claim for fire damage to electrical installation, office equipment, furniture, fixtures and fittings based on the FMD Policy. There was also no specific plea in the defence on this issue.

[7] Though the learned Judicial Commissioner mentioned the existence of two policies in his grounds of judgment, he had omitted to list out the subject matters insured.

[8] Learned counsel for the respondent submitted that fire damage to electrical installation, office equipment, furniture, fixtures and fittings was originally covered under the FMD Policy but he contended that it was omitted in a subsequent endorsement.

[9] In his reply, learned counsel for the appellant drew our attention to an endorsement in the FMD Policy document which stated "office equipment", at the bottom of p. 909, vol. 5 of the

appeal record, and on "electrical installation" at the top of p. 910 thereof which included coverage for electrical installation losses up to RM300,000 and up to RM500,000 for office equipment, furniture, fixtures and fittings.

[10] The total amount of premium paid for the FMD Policy was originally RM32,474.95 (p. 908, vol. 5 of the appeal record) and there was an endorsement issued on 20 June 2005 which increased the sum insured for sewing machines from RM500,000 to RM1,000,000.

[11] The coverage for sewing machines appeared to be RM500,000 for the insured premises and RM500,000 for the new premises. Insurance premium was correspondingly increased to RM34,074.

[12] It was submitted before us that as the endorsement did not state any change to the sums insured for electrical installation, office equipment, furniture, fixtures and fittings, the FMD Policy issued on 7 February 2005 had continued to cover fire damage to electrical installation up to RM300,000 and office equipment, furniture, fixtures and fittings up to RM500,000.

[13] As there appeared to be nothing in writing emanating from the respondent to state that any coverage had been cancelled, we are minded to agree that since the increase in the sum insured for the sewing machines had been paid for by an increase in the premium, there was no cancellation of any existing coverage. We would therefore hold that the said endorsement was to record the increase of coverage for sewing machines and left intact the earlier coverage for electrical installation losses, office equipment, furniture, fixtures and fittings.

The Appellant's Claim

[14] The appellant's claim under the FMD Policy was for fire damage to its stocks, sewing machines, electrical installation, office equipment, furniture, fixtures and fittings and for loss of profits covered under the FCL Policy.

[15] Much documentary evidence was admitted to prove the quantum of losses suffered. Since both policies were specific in covering the insured against the risk of an accidental fire and it was undisputed that the fire occurred within their validity period,

A the onus on the appellant was, *prima facie*, to prove that the fire had caused material damages in the premises covered by the FMD Policy and also losses within the terms of the FCL Policy.

[16] In *Slattery v. Mance* [1962] 1 QB 676, it was held that
B once it is shown that the loss has been caused by fire, the plaintiff has made out a *prima facie* case and the onus is upon the defendant to show that the fire was caused or connived at by the plaintiff and if the court comes to the conclusion that it is equally consistent with arson as it is with an accidental fire, the onus
C being on the defendant, the plaintiff would win on that issue. We are of the view that this trite principle of insurance law is fair and sound because an insurance company is in the business of assuming calculated risks by charging its customers a premium computed based on actuarial science.

D **[17]** Again, the court in *Globe Trawlers Pte Ltd v. National Employers Mutual General Insurance Association Ltd & Anor* [1989] 1 CLJ 831; [1989] 2 CLJ (Rep) 924; [1989] 1 MLJ 463 allowed the plaintiff's claim against the first defendant – referring to the insurance company. Thean J, at the conclusion of the trial, was
E still in doubt as to how the fire started, and His Lordship held that where there is a doubt, the benefit of that doubt should go to the plaintiff. This was what His Lordship said (see p. 469):

> Having reviewed the evidence of both the experts I am still left
F in grave doubt as to where and how precisely the fire started. But the burden of proving that the fire was caused by the wilful act of the plaintiffs or with their connivance lies with the first defendants.

G **[18]** Continuing at p. 470, His Lordship quoted with approval the speech of Salmon J in *Slattery v. Mance* (*supra*) at p. 681 to this effect:

> In my judgment, once it is shown that the loss has been caused by fire, the plaintiff has made out a *prima facie* case and the *onus*
H is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the *onus* being on the defendant, the plaintiff would win on that issue.

I

[19] Although the Singapore Court of Appeal overruled the decision of Thean J, it was on a different ground, leaving intact Thean J's judgment pertaining to the above principle of law.

[20] The appellant called ten witnesses to testify at the trial, including a retired director-general of the chemistry department by the name of Harcharan Singh Tara (PW3) as an expert witness on the cause of the fire and by writ of *subpoena*, a senior customs officer by the name of Mohd Yusni bin Md Yunus (PW7) who was in charge of supervising the appellant's premises prior to the fire. PW7 confirmed that on the date of the fire, the appellant was holding a "Lesen Manufacturing Warehouse" commonly referred to in the trade as "LMW Licence" and a repacking approval to import stocks exempt from import duties, which were to be used for manufacturing, re-packing and re-export purposes. That explained why the appellant's premises were under the constant supervision of the customs and excise department.

The Respondent's Defence

[21] The respondent had sought to repudiate liability completely and pleaded, *inter alia*, fraud. At para. 8 of its defence, the respondent pleaded repudiation of the appellant's claim under Policy No. 8 JBDFFF0542190506 (the FMD Policy) on the grounds that the appellant had breached conditions 9(a), 12 and 15 thereof. Repudiation of the appellant's claim under policy No. JBDFFL0542200503 (the FCL Policy) was pleaded at para. 10 on the grounds that the appellant had breached conditions 8(c) and 12 thereof.

[22] The respondent called four witnesses, including its loss adjuster by the name of Lok Mei Kwan (DW2) and a fire expert by the name of Barry Ian Dillon (DW3), to testify on the cause of the fire.

Condition 9(a) Of The FMD Policy

[23] The respondent's basis for pleading a breach of condition 9(a) of the FMD Policy and condition 8(c) of the FCL Policy (which was of different wording but *pari materia*) was that its loss adjusters report had stated that the appellant's stocks and sewing machines were arranged too closely and in an unusual way which increased the risk of their destruction in the event of a fire.

[24] Condition 9(a) of the FMD Policy reads:

> 9. Under any of the following circumstances the insurance ceases to attach as regards the property affected unless the Insured, before the occurrence of any loss or damage, obtains the sanction of the Company signified by endorsement upon the Policy, by or on behalf of the Company.
>
> (a) If the trade or manufacture carried on be altered, or if the nature of the occupation of or other circumstances affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire.

[25] Now, did the learned Judicial Commissioner misdirect himself and erred in agreeing with the respondent's averment of a breach of condition 9(a) of the FMD Policy and condition 8(c) of the FCL Policy?

[26] The essence of those two conditions was that the insurance ceases to attach as regards the property affected if the appellant was to alter the type of activity carried on at the premises outside the original scope of coverage or if the nature of the occupation affecting the building insured or containing the insured property be changed in such a way as to increase the risk of loss or damage by fire, unless the insured (the appellant) had obtained prior sanction to make such alteration or changes.

[27] The first part of condition 9(a) required the insured to obtain prior sanction of the insurance company if it intends to alter its trade or manufacture outside the scope of the original coverage. It was undisputed that the FMD policy did permit the appellant to use the insured premises to carry on the business of garment manufacturer, and following a subsequent endorsement, also for the business of import, export, warehouse and wholesaler.

[28] The learned Judicial Commissioner erred on this point in overlooking that the said subsequent endorsement had already authorised the appellant to utilise the insured premises to also carry out the business of import, export, warehouse and wholesaler of garments. Thus, even if there had really been any change from the business of garment manufacturer to the business of import, export, warehouse and wholesaler of garments, it would

be well within the endorsed scope of coverage, and not a risk-increasing change or alteration which required prior sanction from the respondent.

[29] Further, the appellant had denied that those sewing machines were "stacked" as alleged by the respondent. According to the appellant, they were placed on the top shelves of racks two and three and could have been easily moved whenever required. The appellant also denied having ceased manufacturing business as it would have used the fabrics purchased from Singapore to manufacture garments if not for the fire (see p. 239, vol. 2 of the appeal record). The import of those fabrics were proven by the Customs Form K1 and not mere bare averments.

[30] The learned Judicial Commissioner's judgment (see p. 17, vol. 1 of the appeal record) showed that he has misread condition 9(a) as requiring the appellant to notify the respondent of "alteration in the circumstances of occupancy" when in fact the first part of condition 9(a) was about alteration in the insured's trade or manufacture. On the evidence, we are satisfied that there was in fact no alteration of the appellant's trade or manufacture outside the scope of the original coverage.

[31] The respondent had also contended that the place of storage of the sewing machines breached condition 9(a). In reply, the appellant submitted that there was absolutely nothing in condition 9(a) which prohibited the storage of sewing machines on the top shelf of a rack.

[32] It was also submitted that the insured was in the best position to decide how to maximise storage space. Evidence was also led by the appellant's witness by the name of Eng Yu Chong (PW2) to explain the rationale of storing sewing machines on the top shelves of racks two and three . In order to illustrate his explanation on how the sewing machines and stocks could be conveniently moved to the higher shelves, he adduced as evidence photographs taken in other garment factories showing the sequence of workers using forklifts and hydraulic hand pallet trucks to move sewing machines.

[33] The learned Judicial Commissioner appeared to have accepted the opinion of the respondent's witness, DW3, that the sewing machines should not have been placed on the top shelf of

A a rack. In his reply, the appellant's counsel drew our attention to the answers given by DW3 under cross-examination, which had compelled him to admit that he failed to take any actual measurement and calculation of the dimension of those racks in the appellant's premises. DW3 also admitted that a forklift could B be easily used to load sewing machines onto racks two and three and he also agreed that rack five ought to be kept empty for easy access as it was located closest to the entrance. The following excerpts of DW3's answers were reproduced in the appellant's submission (taken from pp. 184 to 185, vol. 1 of the appeal C record) to highlight the above admissions made by DW3 under cross-examination:

Q: Is the rack at p4/L the same as rack 5?

A: The rack with the "5" underneath it is similar in dimension D to rack 5 after the fire. I cannot say it is the same but they look the same.

Q: Re: p189/C. Last paragraph. Are these comments part of your job of being a forensic scientist?

E A: Suspicions are not evidence. So what I say here does not form part of my conclusion. It is an observation.

Q: Agree that given the fact that rack 5 is the smallest and most narrow and knowing the dimensions of the sewing machines attached to the stand could be as high as 60 inches as wide F as 30 inches and as long as 47 inches, it is not possible to place them.

A: My comments are still valid. Even if you could place half of the machines on rack 5, it would still make your overall G work much easier.

Q: Are you agreeing that rack 5 is not big enough to store 127 units of machines?

A: I don't know. I haven't done a calculation.

H Q: But you just said half.

A: I just picked a figure of 50%. I don't know that for a fact.

Q: You do not know because you did not measure the machines.

I A: Yes.

Q: Re: p9/L. Bottom photo is a sewing machine attached to a stand being loaded by a forklift.

A: There are 2 sewing machines.

Q: Re: p8/L. Ever seen such an action being taken where 2 men being lifted up by a forklift together with 2 sewing machines for loading.

A: I have seen that before. Not necessarily with sewing machines. It contravenes all safety regulations but nonetheless common.

Q: Re: p191/C. Sketch plan. Agree that space between rack 4 and rack 6 is wide enough for a forklift as in the photo shown earlier, to enter for the sewing machines to be stacked on top of racks 2 and 3?

A: A forklift could go to the corner of rack 3.

Q: So then a forklift could be used to load sewing machines on racks 2 and 3?

A: Yes.

Q: Agree that entrance is roller at bottom of page and at right of page?

A: Yes.

Q: Therefore agree that the area close to rack 5 ought to be kept empty for easy access?

A: It would be wise to keep the area immediately behind the roller free. That is the front roller. But I do not see why it should extend all the way right to rack 5.

Q: Do you have any experience in running a warehouse?

A: No.

Q: Do you therefore agree that it was rational to keep rack 5 empty so that it could be used to keep goods which were arriving at a later date?

A: If that was the case, there would be logic in that.

[34] From the evidence as analysed above, we are of the view that the appellant was in the best position to decide the most expedient method of managing its premises. There was no cogent

A evidence adduced by the respondent to support its contention that there was a breach of condition 9(a). The evidence adduced were, at best, bordering on conjectures and speculations. We therefore rule that the learned Judicial Commissioner has erred in his finding that condition 9(a) of the FMD Policy and condition B 8(c) of the FCL Policy were breached.

Condition 12 of the FMD Policy

[35] In paras. 8.3 and 8.4 of the respondent's defence, the basis for pleading a breach of condition 12 was that a "notice of C claim" ought to have been given within 15 days of the fire and that the appellant's written notice of claim was submitted on 2 February 2006.

[36] The salient parts of condition 12 reads:

D

> 12. On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company:
>
> E
>
> (a) A claim in writing for the loss and damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the F loss or damage, not including profit of any kind.

[37] Condition 12 was clearly intended to ensure that the insurer receives notice of any claim to be made by the insured and it actually consisted of several parts. The primary part reads:

G

> 12. On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company ...

[38] Did the appellant give prompt notice of the fire to the respondent? The evidence is clear that it did, which resulted in the H respondent's loss adjusters arriving at the premises on 13 October 2005 which was just one day after the occurrence of the fire. Notice in writing was given within six days of the fire *vide* the appellant's letter dated 18 October 2005. Although there were grammatical errors in that letter, its contents did clearly notify the I respondent of the appellant's intention "to make full loss claim"

and also mentioned that Crawford adjusters had been appointed by the respondent as the loss adjusters to attend to the appellant's claim. We also noted that in this letter, the appellant mentioned that it was following advice given by the respondent's office identified as Encik Faisal (see p. 327, vol. 2 of the appeal record). It is germane to mention that the respondent did not dispute receipt of the appellant's letter of notification dated 18 October 2005. However, the respondent contended a breach of condition 12 as the appellant's letter, written six days after the fire, did not contain a detailed list and quantification of its claim. This contention was upheld by the learned Judicial Commissioner for the respondent to repudiate liability.

[39] The appellant's learned counsel submitted before us that the second part of condition 12 contained a *proviso* that the claim in writing for the loss and damage suffered only need to contain "... as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed ...". His submission was that since this is a case of complete loss in the fire, it was not reasonably practicable to submit within 15 days a detailed list of all the claims to be made. It was further submitted that the contents of the appellant's letter dated 18 October 2005 has satisfied the second part of condition 12 and that in any event, it was erroneous for the learned Judicial Commissioner to hold that condition 12 had been completely breached.

[40] First, we would hold that, in any event, the appellant had complied with the primary part of condition 12 as it did give prompt notice of the fire and had also written a letter within six days after the fire.

[41] Secondly, it is an undisputed fact that the respondent did not issue any repudiation letter 15 days after the fire. Instead, the respondent had through its loss adjusters issued a five page long letter dated 20 December 2005 which listed the documents required by the respondent from the appellant to process its loss claim. It is germane to mention that this letter was issued 62 days after being officially notified on 18 October 2005 about the fire which occurred on 12 October 2005. It is also not in dispute that the respondent's loss adjuster's final report was only ready ten months after the fire.

[42] If we are to go strictly on the respondent's plea that a "notice of claim" ought to have been given within 15 days after the fire, we could hold that the appellant's letter dated 18 October 2005 was the "notice of claim" required by the respondent. The appellant's subsequent letter on 2 February 2006 had merely given details of its claims after having received the respondent's loss adjusters' letter dated 20 December 2005 which listed all those documents required by the respondent.

[43] Based on the facts of this case, we also agree that it was not "reasonably practicable", to quote from para. (a) of condition 12, for the appellant to give a detailed statement of claim within 15 days after the fire, especially when the letter from the respondent's loss adjusters which listed the documents required by the respondent was received more than 60 days later.

[44] In *Pioneer Concrete (UK) Ltd v. National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274, Bingham J had occasion to consider a similar clause and he held, at p. 278:

> The obvious commercial purpose of the clause is to enable the insurer to perform his role as dominus litis and to investigate accidents and claims at the earliest possible opportunity ...

[45] In his judgment, Bingham J also referred to Lord Denning's judgment in *Barratt Bros (Taxis) Ltd v. Davies, Lickiss (First Third Party), Milestone Motor Policies At Lloyd's (Second Third Party)* [1966] 2 Lloyd's Rep 1 CA; [1966] 1 WLR 1334 CA, which held that so long as notice had been received by the insurers, it was not necessary for the insured to re-inform the insurers even though the earlier notice was given by another party. It was also held that a condition of this nature could be waived by the conduct of the insurers. Bingham J held at pp. 279 to 280:

> The major case relied on is *Barrett Bros. (Taxis) Ltd. v. Davies,* [1966] 2 Lloyd's Rep. 1; [1966] 1 WLR 1334. There had in that case been a collision between a taxi and a motorcyclist and the issue which was raised was whether the motorcyclist was entitled to be indemnified by his insurers who had been joined with him as a third party in the action. The collision occurred on Dec 17, 1964. The motorcyclist at that stage was insured under a policy which contained this term:
>
> > The insured shall give full particulars in writing to [-the insurers-] ... as soon as possible after the occurrence of

> any accident, loss or damage and shall forward immediately any letter, notice of intended prosecution, writ, summons or process relating thereto.

There was a further condition which provided:

> The due observance and fulfilment of the terms, provisions, conditions and endorsement of this policy in so far as they can apply and the truth of the statements and answers in the proposal form shall be conditions precedent to any liability of the underwriters to make any payment under this policy.

Following the accident, the owners of the taxi cab informed the motorcyclist's insurers of the accident, but the motorcyclist himself did not. The motorcyclist then received notice of intended prosecution and a summons returnable on July 2, 1964. He did not send those documents to the insurers, but the insurers were apparently informed of both of the documents by the police directly. They wrote to the motorcyclist on June 23, asking him why he had not informed them, and the motorcyclist claimed to have replied to tell the insurers that he had pleaded guilty by letter. Whether the plea of guilty by letter was entered before or after the insurers wrote to the motorcyclist remains unclear. On July 2 the motorcyclist, having pleaded guilty, was fined, and on August 10, 1964, the insurers repudiated. They contended that the result of the motorcyclist's failure to notify them had caused them prejudice in resisting a civil claim by the owners of the cab. At first instance the learned County Court Judge, who originally heard the claim, decided in favour of the insurers on the grounds that the motorcyclist had failed to send on the notice of intended prosecution or the summons and that the insurers were accordingly entitled to rely on that as a condition precedent. In giving the first judgment in the Court of Appeal, Lord Denning MR, said:

> ... I am afraid I take a different view from the county court judge and for two reasons.

The first of the two reasons which he gave was that there was no breach of condition because the insurers in fact had all the information which they needed, although from another source and not from their insured:

> Seeing that they had received the information from the police, it would be a futile thing to require the motorcyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary.

The second reason given by Lord Denning, MR, was that the insurers' letter of June 23 amounted to a waiver of the condition. Lord Denning MR, then, on pp. 5 and 1340A, said this:

> Apart from these two points, I would put the matter more broadly. This condition 1 was inserted in the policy so as to afford a protection to the insurers so that they should know in good time about the accident and any proceedings consequent on it. If they obtain all the material knowledge from another source so that they are not prejudiced at all by the failure of the insured himself to tell him, then they cannot rely on the condition to defeat the claim.

[46] Similar to condition 12 in our present case, the requirement in *Barratt Bros (Taxis) Ltd v. Davies, Lickiss (First Third Party), Milestone Motor Policies At Lloyd's (Second Third Party)* (*supra*) to notify the insurers within a stipulated time frame was also a condition precedent in the insurance contract. However, the English Court of Appeal applied a purposive approach to construe it and went on to rule that to uphold the insurer's conduct amounted to a waiver of the strict compliance.

[47] Last but not least, it did not escape our attention that the 15 days period in condition 12 was not engraved in stone as it expressly stated:

> ... or such further time as the Company may in writing allow ...

[48] In our view, the respondent had, through its loss adjusters' letter dated 20 December 2005 in exh. "P3" listed the documents required by the respondent, extended time for the appellant to submit a detailed claim.

[49] Based on the facts of this case and the authorities, we would also hold that in any event, the respondent had, by conduct in sending the appellant a list of documents to be furnished instead of issuing a repudiation letter upon expiry of the 15 days period, waived the strict requirement of a detailed claim to be submitted within 15 days after the fire. Alternatively, since the appellant had pleaded estoppel against the respondent in its reply, we are certainly in a position to hold that the respondent was estopped from contending a breach of condition 12 of the FMD Policy. The learned Judicial Commissioner has erred in his finding that condition 12 of the FMD Policy was breached.

[50] A waiver plays an important part in insurance law. It is said that a waiver of a breach of a condition precedent need not be an express waiver. A waiver can readily be implied from the actions of the insurer. It was held in *The Yorkshire Insurance Company Limited And Another v. Craine* [1920] 28 CLR 305, which was affirmed by the Privy Council *vide* [1922] 2 AC 541, that the insurer's act of taking over possession of the salvage after the occurrence of a fire amounted to a waiver of a breach by the insured of a condition precedent in a fire policy.

Condition 15 Of The Fmd Policy

[51] The respondent pleaded a breach of condition 15 of the FMD Policy in paragraph 8.5 of its defence and at paragraph 10.2 thereof, the same plea was repeated to plead a breach of condition 12 of the FCL Policy which was similarly worded.

[52] Although condition 15 was rather wide, the respondent had restricted itself to a plea at para. 8.5 of the respondent's defence that this condition was breached because:

> ... the fire was deliberately caused by the Plaintiff or that the starting of it was connived at by the Plaintiff.

[53] Now, what did the learned Judicial Commissioner rule about the cause of the fire? If he had made a finding of fact that the fire was caused by the appellant, we would have no hesitation to uphold the respondent's plea in para. 8.5 of its defence.

[54] However, the learned Judicial Commissioner had decided that he could not hold that the cause of the fire was deliberate or accidental. The following excerpts of his judgment are now reproduced (see p. 33, vol. 1 of the appeal record):

> To conclude on this issue, suffice to say that having reviewed the entire evidence, with due emphasis on the findings, opinions and conclusions of both parties' experts, I could not hold that the Defendant had proved beyond reasonable doubt that the fire was caused by arson through the wilful act of the Plaintiff and/or its agents or with their connivance.

[55] The effect of the learned Judicial Commissioner's finding was in effect a rejection of the respondent's plea in paras. 8.5 and 10.2 of its defence. Since the respondent did not file any cross-

appeal, the cause of the fire was a non-issue before us. And as pointed out above, in such a factual situation, the law gives the benefit of the doubt to the insured (see *Slattery v. Mance* (*supra*)).

[56] The parties are bound by their pleadings. And the court is not entitled to decide a suit on a matter which is not pleaded. It is salutary to state that the trial of the suit is confined to the pleadings (*Whiting v. East London Waterworks Company* [1884] WN 10; *May v. Chidley And Another* [1894] 1 QB 451; *Roberts v. Plant* [1895] 1 QB 597; *Esso Petroleum Co Ltd v. Southport Corporation* [1956] AC 218 HL, at 238; *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22 FC; *The Chartered Bank v. Yong Chan* [1974] 1 LNS 178; [1974] 1 MLJ 157 FC; *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; [1987] 1 MLJ 302 SC; *Wisma Punca Emas Sdn Bhd v. Dr Donal R O'Holohan* [1986] 1 LNS 46; [1987] 1 MLJ 393, SC; *Muniandy & Anor v. Muhd Abdul Kader Muhd Saheed & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; [1989] 2 MLJ 416 SC, at 418; *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152 SC, at p. 154; *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615; *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633; *Narayanan Ponnusamy v. Kannamah Ponnusamy* [1993] 4 CLJ 389; [1993] 3 MLJ 730; *Abdul Rahim Aki v. Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 4 CLJ 551; [1995] 3 MLJ 417 CA; *S Manickam & Ors v. Ismail Mohamad & Ors* [1996] 1 LNS 117; [1997] 2 MLJ 90; *RHB Bank Bhd v. Dong Haeng Industries Sdn Bhd* [2001] 1 CLJ 417 at p. 438; *Ria Enterprise & Ors v. MBF Finance Bhd* [2001] 1 CLJ 687; *Renofac Builder (M) Sdn Bhd v. Chase Perdana Bhd* [2001] 5 CLJ 371; *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd* [2003] 2 CLJ 520; [2003] 2 MLJ 226; and *Lim Tiong Huai v. Wang Swee Teck berniaga sebagai Wang Plumbering & Electric Co* [2003] 1 LNS 564; [2004] 1 MLJ 638. Thus, it is not necessary for us to delve in detail into the particulars pleaded under para. 8.5 of the defence because they were pleaded not independently but merely in support of the respondent's main averment of fraud, in that the fire was allegedly "... deliberately caused by the plaintiff or that the starting of it was connived at by the plaintiff".

[57] For the sake of completeness, we need to mention that all the particulars below para. 8.5 of the defence were not proven by the evidence adduced. For example, para. (a) under the heading "Particulars" pleaded that the fire "must have been started by the person who has possession of the keys" and para. (c) under the heading "Particulars" which pleaded about the alleged cause of the fire. And both of these allegations had been rejected by the learned Judicial Commissioner.

[58] *En passant*, we also noted that para. (b) under the heading "Particulars" to para. 8.5 of the defence, pleaded "Familiar Investment Holding Sdn Bhd" which is non-existent. There was never an issue about any Malaysian private limited company ("Sdn Bhd") by that name. The name of the company which supplied fabrics to the appellant was Familiar Investment Holdings Pte Ltd. Although we can accept that it was probably a typographical error in the respondent's defence, yet it served to illustrate that typographical errors of names are common and the omission of an "s" in the word "Holdings" in the supplier's invoice should not lead to a firm conclusion that the invoice was fraudulent, especially when the appellant had no control over the contents of an invoice issued by a third party.

[59] Further, the director of Familiar Investment Holdings Pte Ltd by the name of See Toh Kwok Hoong (PW6) testified and he confirmed the existence of the company and also explained that the typographical errors occurred due to the company switching to using computer-generated invoices.

[60] This was certainly a plausible explanation under oath as any switch from typewriters to computerisation would normally undergo a "teething" period. The more cogent evidence which ought to have been considered by the learned Judicial Commissioner were those Customs Forms K1, which were contemporaneous documents to prove import of fabrics from that company.

[61] In the light of the learned Judicial Commissioner's finding on the cause of the fire, the whole of paras. 8.5 and 10.2 of the defence must be rejected. As it is a rudimentary principle of civil litigation that parties must be confined to their pleadings, the learned Judicial Commissioner must confine his findings and judgment within the four corners of their pleadings. With respect, he had erred in omitting to do so.

[62] We would therefore hold that based on the respondent's pleaded defence and the evidence adduced, the learned Judicial Commissioner had erred in upholding the respondent's repudiation of liability. A correct finding would have been that liability had been established and to move on to consider the quantum for the judgment to be awarded.

Quantum To Be Awarded

[63] In its statement of claim, the appellant had prayed for a total judgment sum of RM4,810,894.66 or such other amount deemed fit by the High Court, interest at 8% per annum and costs.

[64] At the end of his witness statement, the respondent's witness (DW4) stated that in the event of it being held liable, a sum of RM2,605,653.21 shall be the quantum payable by the respondent to the appellant.

[65] Despite this concession by the respondent, we must consider the evidence adduced to decide the correct quantum to be awarded.

[66] The appellant's claim consisted of a claim of RM3,500,000 for the loss of stocks perished in the fire, RM500,000 for 127 sewing machines destroyed in the fire, RM20,518 for fire damage to electrical installations, RM290,376.56 for loss of office equipment, furniture, fixtures and fittings and, lastly, under the FCL Policy a claim for RM500,000 being loss of gross profits suffered. The respective amounts claimed by the appellant are all within the limit of the sums insured but we must adjudicate as to whether the appellant had proven the amounts claimed.

The Stocks

[67] The witness statement of Eng Yu Chong (PW2) particularised the appellant's claim showing a total of seven consignments of goods: two from Hangzhou Hua Hong Garments Enterprising Co Ltd, three from Ningbo Zhongsheng 1/E Co. Ltd and two from Familiar Investment Holdings Pte Ltd.

[68] On the existence of those stocks, we noted that the respondent's witnesses (DW2 and DW3) admitted to have collected samples of the stocks lost in the fire and did not doubt that they were the burnt remains of the stocks imported by the

appellant. The respondent's agents did not find the remains of any material other than those listed in those invoices. This was evident from DW3's answers under cross-examination (see pp. 181 to 182, vol. 1 of the appeal record):

Q: Did you collect any samples of unburnt material at rack 1 and to try burning it to get the speed of burning?

A: I collected samples but not for that purpose.

Q: What purpose was it that you collected samples?

A: Myself and the adjusters collected different types of clothings and it was agreed that we would dry them out and keep them because it was easier for us.

Q: You are saying that Mr Lok also collected different type of clothings?

A: We did it together. Samples were collected.

Q: So samples were collected by both of you for your respective investigative purpose?

A: Yes.

Q: What was your purpose of collecting the samples?

A: It was simply a record. I had no experimentation in mind.

Q: Did you bring any of the samples with you today?

A: No. But I think we still have them. We put them in garbage bags, label them and bring them to KL office. We dry them out otherwise they become mouldy and then put them back into the bag.

Q: Roughly how many bags?

A: About 5 to 6 garbage bags.

[69] We found the appellant's submission about those imports to be accurate, which was that all those imports were declared and inspected by the Malaysian Royal Customs and Excise Department and for each of the consignments, the documents required for declaration, *inter alia*, invoice and packing lists were submitted together with a Form K1 which was completed, signed and stamped by a senior customs officer.

[70] We also agree that in the absence of other evidence to the contrary, those Customs Forms K1 are important contemporaneous documents which could not have been backdated as they show the respective date and time of the day when the goods were inspected and imported, the invoice number and official exchange rate used by the customs department to calculate the value of the goods in Malaysian currency (RM), the free on board (FOB) value and the cost insurance and freight (CIF) value of those goods in RM.

[71] Another feature of those Forms K1 is that they showed the exact amount of import duty temporarily exempted pursuant to the "relabelling and repacking" exemption approval (for the five consignments from China) and the pursuant to the "Lesen LMW" for the two consignments of fabrics from Singapore intended to be sewn into garments for re-export.

[72] Six witnesses were called by the appellant to prove the value of the stocks in the appellant's premises at the time of the fire. Mr Fang Bao (PW8) came from Hangzhou Hua Hong Garments Enterprising Co, Miss Ren Jining (PW10) from Ningbo Zhongsheng 1/E Co Ltd and Mr See Toh Kwok Hoong (PW6) from Familiar Investment Holdings Pte Ltd respectively and they duly verified that those invoices were issued by their respective companies.

[73] The duplicates of two invoices and two packing lists brought by PW8 from his office in Hangzhou Hua Hong Garments Enterprising Co Ltd in China were admitted as evidence and marked as exhs. "P85", "P85A", "P86" and "P86A" respectively (see pp. 609 to 612, vol. 4 of the appeal record).

[74] The appellant's counsel submitted that the contents of those invoices and packing lists are the same as those invoices marked as "IDs" earlier during the trial. We are more convinced by Forms K1 which were admitted as evidence during the trial as they were all contemporaneous documents. We also note that PW9 whose name is "Wong Yok Leng" was stated in the Forms K1 (see bottom left corner at pp. 354 and 358, vol. 2 of the appeal record) confirmed that he personally collected the goods from the Singapore port, performed the declaration at the Malaysian customs entry point and ensured direct delivery of the stocks to the appellant's premises.

[75] One other issue regarding the stocks remain to be considered. The amount of RM4,082,921.47 was stated as the total value of the stocks but the appellant claimed a sum of RM3,500,000 being the amount insured for the stocks. In its claim, the appellant stated that the said amount of RM4,082,921.47 included import duties and taxes which were temporarily exempted pending re-export of those goods but those duties and taxes have yet to be paid by the appellant at the date of the trial. The respondent disputed this despite the evidence of the customs officer (PW7) who confirmed that those duties and taxes were still payable. The learned Judicial Commissioner erred in comprehending the exemption of import duties and taxes under the Lesen LMW and repacking approval to be a permanent exemption granted by reason of the appellant being a manufacturer – when in fact, it was a temporary exemption pending re-export. This error was evident from his judgment when he held:

> I agree with the defence argument that it was wrong for Plaintiff to claim for import duties that may be imposed when in all likelihood, it may not be imposed as Plaintiff was exempted from paying the duties by reason of being a manufacturer (see page 20, volume 1 of the appeal record).

[76] As a matter of fact, FMD policy did cover the value of stocks inclusive of import duty and sales tax. This fact was verified by the respondent's witness (DW4) (see p. 196, vol. 1 of the appeal record):

> Q: Re: p7 Q&A para (g). To support your claim that Plaintiff's claim is grossly exaggerated and that Plaintiff had used fraudulent documents, you stated under sub-para (i) that Plaintiff's claim included import and sales tax. Aware that one of the conditions for the LMW warehouse is that the goods imported without import tax must be re-exported?
>
> A: Yes. After explained by the adjusters.
>
> Q: Aware that for goods where import duty and sales tax were not paid, are not re-exported, the Plaintiff is liable to pay import duty and sales tax?
>
> A: I am not aware.

[77] Further down the same page, DW4 answered the question posed in the positive:

> Q: Agree that insurance policy covers value of goods inclusive of import duty and sales tax paid to Government of Malaysia?
>
> A: Yes.

[78] Since the FMD Policy had been admitted to cover the value of goods inclusive of import duties and taxes, we are of the view that there is no reason to deprive the government of revenue due to it. The appellant's total loss of stocks, inclusive of import duties and taxes, was pleaded as RM4,082,921.47 and it claimed a lower amount of RM3,500,000 being the sum insured for loss of stocks. This was a fact disclosed to the respondent's loss adjusters and not a surreptitious claim. In his report, the respondent's loss adjusters had neatly summarised the sum of RM4,082,921.47 to comprise the sum of RM3,093,122.33 being the value of the stocks (before adding import duty and tax) and quantified the sum of RM989,799.15 as the total amount of import duty and tax (see p. 636, vol. 4 of the appeal record). Since the respondent admitted that coverage for loss of stocks under the FMD Policy was inclusive of import duty and taxes which were still due and payable to the customs and excise department, there was nothing fraudulent about the appellant including them in its claim for loss of stocks. It would only be fraudulent if the appellant had received compensation inclusive of import duty and taxes but failed to disclose and make due payments to the said government department. This issue would be resolved by us allowing the appellant's claim for loss of stocks at the insured amount of RM3,500,000 and to add two further orders, firstly that the appellant is to notify the customs and excise department within seven days of receiving payment of compensation from the respondent and secondly, that out of the insured amount of RM3,500,000 a round figure of RM1,000,000 is to paid to the appellant's solicitors on record, to be held by them as stakeholders, to pay the final amount of import duties and taxes imposed by the customs and excise department, and the surplus is to be released to the appellant after final settlement with the customs and excise department. There should be a surplus because this sum of RM1,000,000 exceeds the total amount of import duty and tax quantified earlier.

The Sewing Machines

[79] The appellant had tendered as evidence an original invoice ("P39") and a delivery order ("P40") to prove purchase and delivery of 127 sewing machines to the appellant's premises. The respondent took issue, *inter alia*, with the fact that whilst the invoice was issued by Hong Lin Sewing Machine Pte Ltd, the delivery order was issued by Tarmah Machinery Sdn Bhd.

[80] We found the explanation given by Chua Teck Hee (PW5) who was the sales manager of Tarmah Machinery Sdn Bhd in Malaysia to be credible. PW5 testified that Hong Lin Sewing Machine Pte Ltd and Tarmah Machinery Sdn Bhd are sister companies and that the appellant did purchase 127 new sewing machines from Hong Lin Sewing Machines Pte Ltd of Singapore but delivery was made from Johor because those machines were kept in Johor Bahru in the premises of Hong Lin's Malaysian sister company (Tarmah Machinery Sdn Bhd). Further, the contents of the invoice correspond with the contents of the delivery order stating details of the 127 sewing machines.

[81] PW5 went on to testify that he personally followed the trailer lorry to deliver 127 new sewing machines to the appellant's premises. PW5's evidence was not seriously challenged and he gave full particulars in his witness statement. He was an independent witness who gave first-hand evidence which ought to have been accepted by the learned Judicial Commissioner as the truth about the sale and delivery of 127 new sewing machines to the appellant's premises.

[82] Furthermore, fire does not make metals vanish. Though the fire did destroy those sewing machines, the respondent's witnesses themselves admitted that the metal remains of 127 sewing machines were indeed found at the premises after the fire.

[83] The respondent took issue with an error in PW2's witness statement (marked "PWS2") which stated that the sewing machines were "mesin jahit terpakai". We found that this typographical error was immaterial as it was rectified in court during the trial when the witness clarified that those 127 sewing machines were new sewing machines (see p. 93, vol. 1 of the appeal record):

> Q: Re: Q&A 22. You clearly said that Plaintiff bought '127 buah mesin jahit terpakai'. Agree that used machines were bought and not new ones?

A: Mesin jahit adalah baru dan bukannya terpakai.

[84] The same typographical error was also found in the witness statement of Kok Chek Min (PW1) who was a freelance technician specialising in servicing and repairing sewing machines used in garment factories. He testified that he tested those 127 new sewing machines when they were first delivered to the appellant's premises. The error in his witness statement was likewise corrected through an oral additional question in court (see p. 73, vol. 1 of the appeal record):

P : Confirm whether 127 sewing machines bought by Plaintiff in 2005 whether new or used?

PW1 : New.

Court : So Q&A 2 incorrect. So it's new?

PW1 : Yes. New.

[85] It is opportune for us to point out that witness statements were introduced in recent years to expedite the process of examination-in-chief and not intended to shut out the truth. If the witness discovers any error in its contents of his witness statement while still under oath in the witness box, his *viva voce* evidence should prevail over any error in his witness statement prepared by solicitors. The said error should not have been held against him, especially when there was more cogent evidence adduced in court. A distinction must be drawn between a witness who obviously contradicted himself under cross-examination to avoid disclosing the truth and one who orally pointed out an error in his witness statement.

[86] On the whole, we found the evidence of PW1 and PW5 to be cogent and the learned Judicial Commissioner had erred in overlooking the fact that PW5's evidence corroborated the documentary evidence as well as PW1's evidence of having tested those 127 new machines when they were first delivered to the appellant's premises. We hold that it is normal for someone who had purchased a new electrical product to test it as soon as possible to ensure that it is in good working condition. This is sensible because delay in complaining about any defect might be held against him.

[87] The learned Judicial Commissioner also erred in accepting the evidence of DW3 as a proven fact when DW3 had admitted under cross-examination that he had no prior knowledge of sewing machines. He should have taken note of PW1's testimony in factually confirming that those 127 sewing machines were indeed new machines though some of them were old models.

[88] DW3 admitted under cross-examination that he relied on searches on the internet to conclude that some models were no longer in production. This approach is, with respect, certainly not acceptable as it is clearly hearsay evidence. We take judicial notice that the internet does provide all kinds of information. However, we also take judicial notice that information available on the internet might be erroneous and/or false and some of which might have been uploaded to mislead internet users. The courts are entitled to take judicial notice of matters which are notorious and what everybody knows. And the scope of judicial notice is far from exhaustive and it will continue to be extended from time to time in order to keep pace with the advancement of science and technology (*Dennis v. AJ White & Co* [1916] 2 KB 1, CA, at p. 6; *Ramah Ta'at v. Laton Malim Sutan* [1931] 6 FMSLR 128, CA; *In the matter of the estate and effects of Timah Abdullah, deceased, The Official Administrator, FMS v. 1. Magari Mohihiko 2. Hayashi Tose 3. Udah Bakar 4. State of Pahang* [1941] 10 MLJ 51; *Ram Tarak v. Selgrant* [1944] AC 153; *Lee Lip Ngee v. Crown Counsel* [1947] 13 MLJ 68; *Yong Pak Yong v. PP* [1959] 1 LNS 102; [1959] 25 MLJ 176; *Lim Kong v. PP* [1962] 1 LNS 89; [1962] 28 MLJ 195; *Kong Nen Siew v. Lim Siew Hong* [1971] 1 LNS 53; [1971] 1 MLJ 262; *Lee Chow Meng v. PP* [1975] 1 LNS 199; [1976] 1 MLJ 287; *PP v. Bujang Ali & Ors* [1977] 1 LNS 90; [1978] 1 MLJ 224; *Tractors Malaysia Bhd v. Kumpulan Pembinaan Malaysia Sdn Bhd* [1978] 1 LNS 220; [1979] 1 MLJ 129, FC; *Pang Ah Chee v. Chong Kwee Sang* [1985] 2 CLJ 221; [1985] CLJ (Rep) 236; [1985] 1 MLJ 153, FC; *Pembangunan Maha Murni Sdn Bhd v. Jururus Ladang Sdn Bhd* [1985] 1 LNS 122; [1986] 2 MLJ 30, SC; and *Balakrishnan Kunjamboo Nair v. Savastine Anthony Francis* [1991] 1 CLJ 503; [1991] 2 CLJ (Rep) 327). Now, DW3 ought to have approached the various manufacturers to obtain first-hand information instead of drawing conclusions by doing

some internet searches in the comfort of his office. DW3's answers at pp. 187 and 188, volume 1 of the appeal record are germane to the occasion at hand and they should be reproduced:

Q: Did you personally check with any manufacturers or dealers of sewing machines to see if the models were still available?

A: We used the internet.

Q: So you did not personally checked with manufacturer or dealers?

A: Yes.

Q: Did you receive information from Mr Kok on what he found out on the sewing machines?

A: Not really. What I have written in my report is based on our work and comments by Mr Kok.

Q: Aware there are still new sewing machines of old models 10 year-old still available for sale?

A: Mr Kok advised us of it but I was not aware.

Q: Aware that sewing machines could last up to 30-40 years if well maintained?

A: Yes.

Q: Therefore unusual for old model sewing machines still in production after 20 years?

A: As it approaches 20 years, it becomes improbable for these to still be available. Our internet search showed that it was consistent with Mr Kok's comments. Eg. Groups N, B and P could not be found on the internet. The other machines we could find on the internet.

[89] On the whole, the learned Judicial Commissioner appeared to have adopted the respondent's submission of its witnesses given during examination-in-chief and omitted to examine their answers under cross-examination. For example, DW1 was called by the respondent to prove that some of the appellant's sewing machines could not have been new as they were "obsolete models". An examination of DW1's answers under cross-examination disclosed that his evidence on the sewing machines was wholly hearsay and

ought to have been rejected. This is evident from the answers which DW1 gave under cross-examination (see p. 131, vol. 1 of the appeal record):

Q: The Plaintiff's witness testified that old models being manufactured up to this day because there is a demand.

A: I was not asked to investigate into this area.

Q: You did not investigate whether old models were still manufactured up to this day.

A: That was not part of my instructions.

Q: Put – You are actually unable to confirm whether some old models of sewing machines are still being manufactured up to this day.

A: I agree.

Q: Re: Q&A 2. Para 1. Any document to prove that they were obsolete models and already discontinued?

A: This were the exact words used by the salesman I interviewed. No, I do not have any documents.

Q: Besides model E52 and DCR 622, which other models are obsolete?

A: These were 2 specific models quoted to me by the salesman. I was not able to tell him all models through the phone.

Q: Agree that your enquiry was only made through telephone?

A: Yes.

Q: Therefore, no documents to substantiate the statement that they are obsolete.

A: Yes.

Q: These purely based on what told to you by a salesman through a telephone?

A: Yes.

Q: Remember the name of the salesman?

A: I cannot recall.

[90] By reason of the above, we are satisfied that the appellant's claim for RM500,000 being the sum insured for loss of the sewing machines ought to be allowed.

Electrical Installation

[91] The appellant was insured up to RM300,000 for fire damage to electrical installation and its claim was RM20,518. The receipts for electrical installation were only marked as "IDs" and not admitted in evidence as the appellant was unable to produce the originals in court.

[92] Learned counsel for the appellant had submitted that we have the power under s. 65 of the Evidence Act 1950 to admit the contents of copies of documents the originals of which had been destroyed or lost. We are not inclined to do so and would accordingly disallow the appellant's claim for fire damage to electrical installation.

Office Equipment, Furniture, Fixtures, And Fittings

[93] The sum insured under this head was RM600,000 and the appellant submitted a claim for RM290,376.56. However, part of the evidence submitted in support of this claim was marked only as "IDs" as the appellant was unable to produce the originals in court.

[94] The original receipt admitted in evidence (exh. "P46") was for a sum of RM200,463.50. We would therefore allow a sum of RM200,463.50 for the appellant's loss for fire damage to office equipment, furniture, fixtures and fittings.

Loss Of Gross Profits Under The FCL Policy

[95] The FCL Policy was intended to cover loss of gross profits suffered by the appellant. Upon careful perusal of the evidence and also the loss adjusters' report, we are of the view that the appellant failed to prove the amount of loss of gross profits claimed. In fairness to the appellant, we must clarify that this finding should not cast any aspersion on the evidence adduced by the appellant.

[96] We are simply of the view that the appellant should have adduced more detailed evidence to substantiate its claim for loss of profits. The evidence adduced was, in our view, inadequate.

Those agreements in the Chinese language referred to during the trial, which specified a profit margin of fifteen per cent (15%), were only marked as "IDs" and not admitted in evidence. We would therefore decline to make any award under the FCL Policy.

Standard Of Proof

[97] Learned counsel for the appellant submitted at length that the learned Judicial Commissioner applied the wrong standard of proof of balance of probabilities in evaluating the respondent's evidence to prove fraud.

[98] We are of the view that we need not address this issue because as analysed above, para.h 8.5 of the respondent's defence was a plea of repudiation of condition 15 of the FMD Policy which firmly anchored on its allegation that:

> ... the fire was '... deliberately caused by the Plaintiff or that the starting of it was connived at by the Plaintiff'.

[99] Arson is the act of setting fire intentionally and unlawfully. Following thereto, there could be no doubt that the standard of proof applicable to support the respondent's said plea, of breach of condition 15 as a fraudulent claim based on alleged arson, must be on the basis of beyond reasonable doubt.

[100] However, since the learned Judicial Commissioner had expressly rejected the respondent's said contention on the cause of the fire and there was no cross-appeal by the respondent, there is no need for us to rule on this issue. Suffice for us to say that it is trite law that where an allegation of fraud is made in civil proceedings, the standard of proof required must be on the basis of beyond reasonable doubt and not merely on a balance of probabilities. The Federal Court in *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1; [2007] 2 MLJ 301, at p. 318 held:

> At most the respondent succeeded in creating a suspicion in the cause of the fire by arson. Suspicion, however great, is insufficient to prove fraud which needs to be proved beyond any reasonable doubt. In this case, the respondent, being the insurer, has not discharged the onus of proof of the charged fraud and the appellant, being the assured, therefore must succeed.

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Conclusion

[101] In conclusion, we allow the appellant's appeal and order that judgment be entered for the appellant as stated above, that is, RM3,500,000 for loss of stocks, RM500,000 for loss of the
B sewing machines and RM200,463.50 for the loss of office equipment, furniture, fixtures and fittings.

[102] No award is made for loss of electrical installation or for loss of profits.

C **[103]** As the learned Chief Justice had issued a Practice Direction No. 1 of 2012 effective on 1 August 2002, fixing interest rate on judgment sums at five per cent (5%), we would award interest on the judgment sum at five per cent (5%) per annum from the date of the writ of summons until the date of payment.

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[104] As for costs, we award the appellant a global sum of RM150,000 as costs here and at the High Court below.

[105] We also make an order that the appellant to notify the
E customs and excise department within seven days of receiving payment of compensation from the respondent based on the judgment and secondly, that out of the insured amount of RM3,500,000 a round figure of RM1,000,000 is to paid to the appellant's solicitors on record, to be held by them as
F stakeholders, to pay the final amount of import duties and taxes imposed by the customs and excise department, and the surplus is to be released to the appellant after final settlement with the customs and excise department.

[106] Finally, the deposit should be refunded to the appellant.

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